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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL GONZALEZ,

Defendant and Appellant.

D047340

(Super. Ct. No. SCD185665)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed.

I.

INTRODUCTION

Defendant Manuel Gonzalez appeals from his conviction for selling and furnishing cocaine base (Health & Saf. Code, § 11352, subd. (a)), and possession of cocaine base for sale (Health & Saf. Code, § 11351.5). Gonzalez contends that the trial court erroneously ruled that his police station confession was admissible. Gonzalez also contends that his

counsel provided ineffective assistance by calling a witness whose testimony allowed the prosecutor to introduce incriminating statements the witness had made about Gonzalez.

We conclude that the trial court did not err in ruling that Gonzalez's police station confession was admissible, and that defense counsel's decision to call the witness in question did not amount to ineffective assistance of counsel. We thus affirm the judgment of conviction.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Procedural background*

By information filed October 15, 2004, Gonzalez was charged with selling and furnishing cocaine base (count 1) and possession of cocaine base for sale (count 2). The information also alleged that Gonzalez was ineligible for probation under Penal Code section 1203.073, subdivision (b)(7), and that he had suffered one prison prior within the meaning of Penal Code sections 667.5(b) and 668, which resulted from convictions for unlawful taking of a vehicle (Veh. Code, § 10851, subd. (a)) and felony unlawful possession of a firearm (Pen. Code, § 12021, subd. (a)(1)).

Gonzalez pled not guilty and denied the enhancement allegations. Beginning on April 29, 2005, the trial court considered a number of in limine motions. Gonzalez moved to suppress a confession he made while being questioned at the police station after his arrest. The trial court denied Gonzalez's motion.

Trial began on May 5, 2005. The jury found Gonzalez guilty on both counts. At a bifurcated trial, the court found true the allegation that Gonzalez had suffered a prison prior.

On October 13, 2005, the court sentenced Gonzalez to five years in state prison. The sentence consisted of a four-year midterm sentence on count 1 and an additional year for the prison prior. The court also sentenced Gonzalez to a four-year midterm on count 2, to run concurrently with the sentence on count 1, and stayed that term pursuant to Penal Code section 654.

B. *Factual background*

1. *The prosecution's case*

In the early evening of September 18, 2004, San Diego Police officers conducted a "buy/bust" operation on C Street in downtown San Diego.¹ Officer Schneider, who was working undercover posing as a buyer, saw Gonzalez standing against the outside wall of a 7-Eleven store on the corner of C Street and Sixth Avenue. Schneider approached Gonzalez and asked Gonzalez if he was "serving" (i.e., selling drugs). Gonzalez did not respond to Schneider. Schneider walked west on C Street for two or three blocks, then

¹ Officer Phillip Schneider described "buy/bust" operations in the following manner: "When we go out on a buy, one person is dressed in casual attire posing as an undercover officer attempting to buy drugs from street-level dealers. The other officers are in perimeter positions that we call surveillance positions. They're our eyes. They're primarily our office [*sic*] safety observers of the transaction that, if I'm the undercover officer, I might have with somebody else. [¶] They're also to relay information via radio to each other, and to the waiting patrol officers who are the scoops to come and make the arrest if we're successful in purchasing narcotics."

turned around and walked back toward Sixth Avenue. As he approached Sixth Avenue, Schneider saw Gonzalez standing in the same location, talking with another man, Daniel Loffredo.

As Schneider approached the two men, Loffredo walked toward him and asked him whether he was "looking for something." Schneider responded, "I need a 20."² Loffredo told Schneider, "Okay, I'll get you at the phone booth," and motioned toward some telephone booths located just west of where the two men were standing. Loffredo walked back to Gonzalez, and spoke very briefly with him. Schneider saw Gonzalez hand Loffredo a small object. Loffredo took the object in his left hand and closed that hand into a fist. Loffredo then walked directly over to Schneider and held out his left fist. Schneider handed Loffredo "prerecorded currency," which Loffredo took with his right hand, and Loffredo dropped the item from his left fist into Schneider's hand. Later testing established that Loffredo had given Schneider three pieces of cocaine base, totaling .23 grams.

After Loffredo handed the item to Schneider, Schneider gave a "bust signal" indicating that he believed he had been successful in purchasing rock cocaine. Schneider walked out of the area to a predetermined spot where a supervisor picked him up in an unmarked police car.

² Schneider testified that "a 20" means "\$20 worth, or a \$20 piece of rock cocaine or cocaine base."

San Diego Police Detective Paul Rorrison observed Loffredo exchange an object with Gonzalez and observed Loffredo and Gonzalez enter the 7-Eleven. When officers entered the 7-Eleven, Gonzalez ran out the door and headed east on C Street. The officers arrested Loffredo inside the store and recovered the prerecorded \$20 bill, which they found on the store counter. Loffredo was taken to the central police substation for processing. Police found a \$20 bill and a \$10 bill in Loffredo's wallet, and a syringe, baggies, a spoon and cotton balls in Loffredo's backpack.

Officer Michael Day heard radio calls directing officers to arrest a man in a blue shirt who was running toward Seventh Avenue. Day saw a man who matched that description, later identified as Gonzalez, running on Seventh Avenue. As Day approached, Gonzalez stopped next to a car that was later identified as belonging to Gonzalez's girlfriend, Fallon Jackson.³ As Day attempted to grab Gonzalez's hands, Jackson approached Day from behind and began yelling and screaming at Day. Day yelled back at Jackson, which angered Gonzalez.

Officer Day attempted to put Gonzalez in the patrol car, but Gonzalez resisted getting into the car. Gonzalez yelled at Day, "I'm going to fuck you up." Day then pulled Gonzalez back from the car and put Gonzalez on the ground, face down. Day put his knee on Gonzalez's back to maintain control over Gonzalez. Gonzalez then "calmed down" and began to apologize to Day, saying, "'Officer, I'm sorry. I apologize. You're

³ Gonzalez and Jackson married prior to Gonzalez's trial.

not going to have any more problems with me."⁴ Day was then able to place Gonzalez in the back seat of the patrol car. As Day was engaged with Gonzalez, Officer Matt Novak pulled Jackson away from Day and Gonzalez and kept her away from them.

Day took Gonzalez to the central police station. At the station, Officer Schneider questioned Loffredo and Gonzalez separately. Schneider advised Loffredo and Gonzalez of their *Miranda*⁵ rights. Both men waived their rights and agreed to talk with Schneider. Loffredo told Schneider that Gonzalez had given Loffredo the drugs and had told Loffredo that if Loffredo made the sale, Gonzalez would give Loffredo \$5.

Schneider asked Gonzalez whether Gonzalez recognized Schneider. Gonzalez answered, "Yeah, I sold you the dope." Schneider then asked, "So you had the dope first?" Gonzalez responded, "Yeah." Following up, Schneider said, "So, you served it up to the other guy?" Gonzalez responded, "Yeah, I should have left when you hit me up the first time." Schneider asked Gonzalez why he had done it, and Gonzalez responded that he "needed a quick 20" so he came downtown to pay a phone bill and had his girlfriend park the car so he could "sell the boulder real quick." When Schneider

⁴ At an initial intake screening, Gonzalez reported that he had not been injured during the encounter with Officer Day. However, at a later medical screening, Gonzalez complained that his head, right hand and back were injured. Beverly Orr, a registered nurse, examined Gonzalez approximately eight to nine hours after his arrest. Gonzalez told Orr that he had been "tackled and taken down." Orr found that Gonzalez had a minor bruise on his right upper forehead and a minor abrasion on the knuckles of his right hand. She found no visible sign of injury to Gonzalez's back.

⁵ *Miranda v. Arizona* (1966) 384 U.S. 436.

asked Gonzalez why he had decided to sell to Schneider after all, Gonzalez said, "I don't know, man. I'm never downtown." "You don't even look like a smoker."

2. *The defense*

Gonzalez did not testify. Loffredo was called as a defense witness.⁶ Loffredo testified that he had not known Gonzalez prior to the day they were arrested. Loffredo said that Gonzalez had nothing to do with the rock cocaine sale. Loffredo testified that he had asked Gonzalez for change to make a phone call, and that Gonzalez had given him the change, which Loffredo put in his backpack. Loffredo claimed that he found the cocaine base on the street as he walked toward Sixth Avenue and C Street. Loffredo testified that he had been holding the cocaine in his mouth, and that he had spit it out so that he could sell it to Schneider.

Jackson testified that Gonzalez had gone downtown to pay a cellular telephone bill at Horton Plaza. He called her after he paid the bill, and they made plans to go out to dinner. Jackson parked her car on Seventh Avenue, near C Street, and saw Gonzalez walking toward her at a normal pace. As he neared her car, a police car drove up. A police officer jumped out of the car and arrested Gonzalez. Jackson asked the officer what was happening, and the officer yelled for her to stop talking to him. She was then handcuffed.

⁶ Loffredo had been charged with the same offenses with which Gonzalez was charged. Loffredo pled guilty to both charges prior to Gonzalez's trial, and received a four-year prison sentence.

According to Jackson, the officer put Gonzalez in the patrol car, but after a verbal exchange between Gonzalez and the officer, the officer pulled Gonzalez out of the car and threw him to the ground, smashing Gonzalez's face into the concrete. The officer then put Gonzalez back into the patrol car.

Jackson said that a police officer had insisted that she knew where the drugs were. Jackson denied that she had any drugs and told the officers that they could search her car. An officer searched Jackson's car and found nothing.⁷ According to Jackson, another police officer threatened Gonzalez by saying to him that if he did not tell the police officers where the drugs were, the officers would arrest his girlfriend.

III.

DISCUSSION

A. *The trial court did not err in ruling that the confession Gonzalez made at the police station was admissible*

Gonzalez contends that the trial court failed to consider applicable law when the court denied his motion to exclude inculpatory statements Gonzalez made to Schneider at the police station. Gonzalez asserts that the trial court failed to consider the United States Supreme Court's decision in *Missouri v. Seibert* (2004) 542 U.S. 600 (*Seibert*), and that neither the court nor counsel discussed the line of cases that hold that a threat to arrest a family member renders a confession involuntary. Gonzalez argues that his case should

⁷ The record does not clearly establish which officer searched Jackson's car.

be remanded to the trial court for a rehearing on Gonzalez's motion to suppress his police station confession.

1. *Additional background*

Prior to trial, Gonzalez moved to suppress incriminating statements he made to Officer Schneider. In his motion, Gonzalez contended that officers had coerced a confession from him at the scene by handcuffing Jackson, "rough[ing] up" Gonzalez and allowing Jackson to go only after Gonzalez admitted that he was involved in the drug deal. Gonzalez argued that the officers' conduct constituted duress, and that any inculpatory statements Gonzalez may have made at the police station were "fruit of the duress-induced confession" he made at the scene of his arrest. Gonzalez also argued that Officer Schneider's accounts of what Loffredo and Gonzalez had told him were implausible, suggesting that Schneider had fabricated Gonzalez's confession. The court held a hearing pursuant to Evidence Code section 402.

In response to defense allegations that officers at the scene coerced an involuntary confession from Gonzalez, Officers Day and Novak testified. Officer Day testified that he received a description of Gonzalez and a signal to arrest him. Day observed Gonzalez running away from the scene and chased Gonzalez in a patrol car. As Gonzalez reached a parked car, Day got out of his patrol car and stopped Gonzalez to arrest him. When Day attempted to handcuff Gonzalez, Jackson, who had been inside the parked car, got out of the car and began arguing loudly with Day. Day had not seen Jackson approach him. Jackson and Gonzalez were both arguing with Officer Day, and became increasingly agitated and upset. Day felt that Jackson was interfering with his arrest of

Gonzalez. Day held out his hand and ordered Jackson to "stay back." Officer Novak arrived to assist Day. Novak led Jackson away from Day and Gonzalez. As Day attempted to put Gonzalez in the patrol car, Gonzalez tried to jerk away, and yelled obscenities at Day. Day placed Gonzalez on the ground, and Gonzalez calmed down. Day was then able to put Gonzalez in the patrol car. Day took Gonzalez's basic information and drove Gonzalez to the police station. Novak obtained information from Jackson.⁸ Day did not remember Gonzalez making any incriminating statements prior to their arrival at the police station.

Officer Day denied "ma[king] any physical blows on [Gonzalez]," or "display[ing] any weapons of any kind." Day also denied having threatened Gonzalez. Day was asked specifically whether Officer Novak had questioned Gonzalez at the time of his arrest:

"Q. Okay. Are you aware of an interrogation that was conducted of the defendant by Officer Novak at the scene?

"A. No.

"Q. Were you present when he asked the defendant questions?

"A. If he did, I would have been present because [Gonzalez] was in the back of my police car.

"Q. So you're saying you weren't present when he asked any questions?

⁸ It appears from the record that the officers agreed that at some point, Jackson was handcuffed, although Officer Day had trouble remembering whether she had been handcuffed, and did not know who might have handcuffed her. Officer Novak did not remember whether Jackson was handcuffed when he arrived to assist Officer Day, and could not recall whether she was handcuffed when he and Officer Day spoke with her after Gonzalez had been placed in the patrol car.

"A. I didn't say that, sir. I said if Officer Novak questioned [Gonzalez], I would have been present because [Gonzalez] was in the back of my police car. So, I wouldn't have went [*sic*] anywhere.

"Q. Do you recall him questioning the defendant?

"A. I don't.

"Q. Do you recall the defendant making any admissions at 7th Street before being taken to the police station?

"A. I don't recall him saying anything.

"Q. He said many things according to your prior testimony.

"A. Well, towards a confession, I don't remember him saying anything that way.

"Q. So your testimony is that he was angry, then he was apologetic, but he did not confess?

"A. He did not confess to me.

"Q. All right."

Officer Novak testified that he saw Jackson standing very close to Officer Day, and that he separated Jackson from Day to ensure Day's safety. Novak saw his role as "be[ing] there as a cover officer for Officer Day, making sure that he was safe." Novak said that Jackson was saying things to Day such as, "What are you doing?" and "You can't do that" very loudly, as Day was attempting to place Gonzalez in the police car. Novak was telling Jackson that she could not talk to Officer Day at that time. After Day put Gonzalez in the police car, Day approached Novak and Jackson and discussed "[t]he things that had gone on before [he placed Gonzalez in the car]." Jackson provided Novak

with "her information." Although Novak did not specifically remember searching Jackson's car, he acknowledged that it was possible that he had done so.

Officer Novak denied that he had threatened Gonzalez or Jackson. He also testified that he did not recall having heard any threats made during the entire time Novak and Day were in contact with Gonzalez. Novak did not recall talking with Gonzalez to try to determine whether Gonzalez "was prepared to exonerate [Jackson]" and did not recall asking Gonzalez "to assume responsibility for th[e] crime" if Gonzalez wanted Jackson to be released. Novak denied that he had "extracted a confession from [Gonzalez] on the condition that if [Gonzalez] confessed to [the crime], [Jackson] would be let go."

The defense called Jackson, Jackson's mother, and Gonzalez to testify in support of the motion to suppress. Jackson testified that arresting officers had approached Gonzalez and told him, "We're going to take your girlfriend in if you don't tell us where the drugs are." According to Jackson, Gonzalez replied, "I don't have drugs." One of the officers responded, "Well, just say you have drugs and we'll let her go." Gonzalez then said, "Fine, if that's what you want to hear, I have them then."

Jackson's mother testified that when Jackson returned home after Gonzalez had been arrested, Jackson recounted that the police had told Gonzalez that if he did not confess, they were going to take Jackson to the police station.

Gonzalez testified that while he was in the police car after Jackson had been handcuffed, a white police officer said to him, "Come on, man, we know you got drugs. Where's the drugs." Gonzalez responded, "I ain't got no drugs." The officer said, "Tell us you sold us the drugs and I'll let your girlfriend go. If you really cared about her" After that, Gonzalez said, "All right, I sold you the drugs. That's what you wanted to hear, let her go." The officers then removed Jackson's handcuffs and allowed her to leave.

Gonzalez testified that when Schneider took him to the interrogation room at the police station, Schneider said, "Well, you're the one that sold me the drugs." Gonzalez denied knowing what Schneider was talking about. When Schneider asked Gonzalez if he recognized Schneider, Gonzalez indicated that he did not. Gonzalez denied that he was asked any other questions or that he had made any of the statements to which Schneider had testified. Gonzalez claimed that when he was read his *Miranda* rights, he told Schneider that he did not want to talk.

Officer Schneider's account of his interaction with Gonzalez at the police station differed markedly from Gonzalez's account. Schneider testified that he questioned Gonzalez in a holding cell at the police station. Schneider said he advised Gonzalez of his *Miranda* rights, and that Gonzalez indicated that he understood his rights and that he would voluntarily talk to Schneider. During that conversation, Gonzalez made a number of incriminating statements, including that he was the person who had sold "dope" to Schneider.

After hearing the testimony, the trial court concluded:

"I do not find [Jackson] very credible. I don't believe that [Gonzalez] was being particularly credible about his sequence of what occurred at the scene, although I'm sure he too was upset about the involvement of his girlfriend, even if you take exactly what the officers said occurred [as true]. [¶] I don't believe—I am ruling that—I'm finding for purposes of my ruling that there was no police misconduct in trying to force a confession or a statement out of Mr. Gonzalez at the scene. [¶] Therefore, I do agree that if that had been done, that the subsequent statement would not be admissible[,] but I'm finding that in the totality of the circumstances, that the statement is voluntary. [¶] The only statement that's being offered by the [P]eople is the one at the police station. [¶] It is my understanding that it is the position of the [P]eople that the earlier statement made at the scene that the defendant has talked about did not occur."

2. *Analysis*

"The Fourteenth Amendment to the federal Constitution and article I, section 15, of the state Constitution bar the prosecution from using a defendant's involuntary confession. [Citations.] The federal Constitution requires the prosecution to establish, by a preponderance of the evidence, that a defendant's confession was voluntary. [Citation.] The same is now true under California law [Citations.]" (*People v. Massie* (1998) 19 Cal.4th 550, 576 (*Massie*); see also *People v. Weaver* (2001) 26 Cal.4th 876, 920 ["[T]he state's burden is to prove the voluntariness of a confession by a preponderance of the evidence."]) (*Weaver*).)

"Under both state and federal law, courts apply a 'totality of circumstances' test to determine the voluntariness of a confession. [Citations.] Among the factors to be considered are "the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's

maturity [citation]; education [citation]; physical condition [citation]; and mental health. [Citation.] On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review. [Citations]" (*Massie, supra*, 19 Cal.4th at p. 576.) "Threats to arrest family members . . . can render a subsequent confession involuntary. [Citation.]" (*Weaver, supra*, 26 Cal.4th at p. 920.)

Gonzalez contends that the trial court failed to "answer the questions the law required [the court to] answer[]." Specifically, Gonzalez asserts that the trial court failed to consider the United States Supreme Court's decision in *Seibert*. He further argues that the court's error in failing to consider the issues raised in *Seibert* is compounded by the fact that the court also failed to consider the line of cases that hold that a confession brought about by a threat to a family member is inadmissible. (See *People v. Trout* (1960) 54 Cal.2d 576, 584, overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510; *People v. Matlock* (1959) 51 Cal.2d 682, 697; *People v. Shelton* (1957) 151 Cal.App.2d 587, 588; *People v. Mellus* (1933) 134 Cal.App. 219, 225.)

In *Seibert*, a plurality of the United States Supreme Court questioned the validity of the police tactic of "question first, warn later," and concluded that this tactic could undermine the very purpose of the *Miranda* warnings. The *Seibert* court held that the defendant's second confession, which he made after he was given *Miranda* warnings, was inadmissible because officers had first elicited a similar confession, without giving the defendant *Miranda* warnings. In reaching this conclusion, the court stated that the circumstances of the second confession in *Seibert* did not "reasonably support a

conclusion that the [*Miranda*] warnings given could have served their purpose [to reduce the risk of admitting coerced confessions]." (*Seibert, supra*, 542 U.S. at p. 617.)

Gonzalez contends that *Seibert* applies here, and that although *Seibert* was decided prior to the hearing on his motion to suppress his confession, the trial court ignored the holding in *Seibert*. Specifically, Gonzalez argues that the trial court did not find that no "un*Mirandized* questioning at the scene took place," and that *Seibert* thus applies.

After independently reviewing the record, we conclude that the trial court did not err in determining that Gonzalez's police station confession was admissible. In arguing that *Seibert* and cases involving threats to family members apply to his case, Gonzalez fails to acknowledge that the trial court did not believe the version of events presented by the defense. The court rejected Gonzalez's contention that he was interrogated at the scene of his arrest and that police threatened to arrest his girlfriend if he did not confess.⁹ Gonzalez argues that "[t]he court's finding 'there was no police misconduct in trying to force a confession or a statement out of Mr. Gonzalez at the scene'" is not a finding that the un*Mirandized* questioning at the scene did not take place. We disagree with Gonzalez's interpretation of the court's findings. It is clear that the trial court believed the

⁹ In discussing Jackson's credibility, the trial court said: "I have no doubt that certain things occurred along the lines of the officers asking the defendant's wife, making statements to her about her choice in boyfriends. [¶] I believe, based upon the testimony, that she was extremely upset. If you want to call that hysterical, that's fine . . . [¶] I am disappointed, at the very least, in the sense that I don't think she was completely truthful on the stand. [¶] She got devious on the stand at the point in time when simple things were asked. . . . [¶] I did not find her to be particularly credible. And. [*Sic*] In certain instances, I found her to be not credible because she was becoming devious."

officers' version of events, and disbelieved Gonzalez's and Jackson's version. The trial court's statement," Therefore, I do agree that *if that had been done*, that the subsequent statement would not be admissible[,] but I'm finding that in the totality of the circumstances, that the statement is voluntary," reflects the court's determination that there was no coercion of a confession by use of threats toward Gonzalez or Jackson at the scene of the arrest.

There is substantial evidence to support the trial court's findings regarding the alleged coerced, pre-*Miranda* confession. Officer Day's testimony revealed that he attempted to prevent Gonzalez from talking with him about the events at the time of the arrest. After Day was finally able to place Gonzalez in the patrol car, Gonzalez became "apologetic," and Day testified, "He [Gonzalez] was telling me he was sorry for what he did. Then I started [to] explain to him, 'Hey, this is a narcotic's arrest. The detectives are going to talk to you about it. I didn't see what happened; I don't know the details. Just stay cool and everything is going to be fine.'" In addition, both officers testified that they never threatened Gonzalez or Jackson. The officers' testimony, which the trial court found to be more credible than the testimony provided by Gonzalez, Jackson, and

Jackson's mother,¹⁰ constitutes substantial evidence to support the trial court's implicit finding that there were no threats and no improper interrogation at the scene of the arrest. Given the trial court's findings of fact and credibility determinations, under the totality of the circumstances, Gonzalez's confession to Schneider at the police station was voluntary. The court thus did not err in admitting evidence of Gonzalez's police station confession.

B. *Defense counsel's decision to call Daniel Loffredo to testify did not constitute ineffective assistance of counsel*

Gonzalez contends that his attorney rendered ineffective assistance by calling Gonzalez's codefendant, Loffredo, to testify on Gonzalez's behalf. According to Gonzalez, calling Loffredo as a witness allowed the prosecution to introduce otherwise inadmissible incriminating statements Loffredo had made about Gonzalez after Loffredo's arrest.

1. *Additional background*

The prosecution called Officer Schneider to testify during the prosecution's case-in-chief. During cross examination, defense counsel asked Schneider about the beginning of the conversation he had with Loffredo after Loffredo's arrest. On redirect, the prosecutor elicited from Schneider testimony about what Loffredo had told Schneider

¹⁰ It appears that the trial court did not find Jackson's mother to be not credible in general, but rather, that the court did not believe Jackson's mother had received credible information from Jackson, and that this information formed the basis of Jackson's mother's testimony. When asked by defense counsel whether the court was finding Jackson's mother to be a "liar," the court said, "I think the daughter said to the mother whatever she said, but it sort of begs the question. [¶] The daughter was upset, and the exact content of exactly what she said at that particular point in time, the exact wording of it, you know, I take it with a huge grain of salt."

when Schneider asked him where he had gotten the rock cocaine. Schneider testified that Loffredo told Schneider he had gotten the cocaine from Gonzalez.

Later, the defense called Loffredo as a witness. Loffredo testified that he had not known Gonzalez prior to the day they were arrested, that he had asked Gonzalez for spare change to make a telephone call, and that he committed the crime on his own and without any involvement from Gonzalez. He also denied having made any statements to the police or to a probation officer that implicated Gonzalez.

The prosecution called San Diego Police Officer Ramirez and Probation Officer Elizabeth Forrey in rebuttal. Ramirez testified that after he arrested Loffredo inside the 7-Eleven, the two went outside and saw Gonzalez running eastbound. Ramirez asked Loffredo whether he knew the man who was running, and Loffredo answered, "That's the guy who gave me the piece of cocaine to sell." Probation Officer Forrey testified that Loffredo told her he had gone to the corner of Fifth Avenue and C Street to get some money for a hotel room. A "Mexican dude" approached him and "asked why the white guy on the corner was staring at him." Loffredo walked over to the "white guy" and asked what he was looking for, and the man responded that he wanted to buy \$20 worth of cocaine. Loffredo walked back over to the "Mexican dude" and the "Mexican dude" gave him the rock cocaine that he then sold to the "white guy."

2. *Analysis*

To prevail on his claim of ineffective assistance of counsel, Gonzalez must demonstrate (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*)). "If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Holt* (1997) 15 Cal.4th 619, 703.) The inquiry as to counsel's performance "must be whether counsel's assistance was reasonable considering all the circumstances." (*Strickland, supra*, 466 U.S. at p. 688.) This means that "[r]eviewing courts will reverse convictions on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission." (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.)

Appellate courts ""defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" [Citation.] "[W]e accord great deference to counsel's tactical decisions" [citation], and we have explained that "courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight" [citation]. "Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts." [Citation.]' [Citation.]" (*People v. Stanley* (2006) 39 Cal.4th 913, 954.)

Whether to call certain witnesses is ordinarily "a matter of trial tactics." (*People v. Bolin* (1998) 18 Cal.4th 297, 334 [challenge regarding counsel's failure to call defense experts]; see also *People v. Mitcham* (1992) 1 Cal.4th 1027, 1059 ["The decisions whether to waive opening statement and whether to put on witnesses are matters of trial tactics and strategy which a reviewing court generally may not second-guess."].)

Gonzalez contends that his counsel rendered ineffective assistance by rendering admissible inculpatory statements that would otherwise have constituted inadmissible hearsay. He argues that trial counsel's decision to call Loffredo to testify was "inexplicable," and that counsel's strategy was "ridiculous." Further, in support of his contention that an ineffective assistance claim may properly be raised on appeal in cases where "'there simply could be no satisfactory explanation'" for defense counsel's action, Gonzalez implicitly suggests that his trial counsel's representation fell below an objective standard of reasonableness because there is "no satisfactory explanation" for counsel's decision to call Loffredo as a witness, citing *People v. Wilson* (1992) 3 Cal.4th 926, 936.

We disagree with Gonzalez's suggestion that there is no satisfactory explanation for trial counsel's decision to call Loffredo as a defense witness. While trial counsel's decision to call Loffredo to testify might have been, in retrospect, a poor decision, it was a matter of trial tactics and should not be second-guessed at this juncture. On direct examination, Loffredo testified that he, alone, was responsible for the sale of rock cocaine, exculpating Gonzalez. Loffredo said that he had never met Gonzalez before the day in question, and that he had merely asked Gonzalez for spare change and chatted with him about living on the street. Without Loffredo's testimony about Gonzalez's lack of involvement in the transaction, the only evidence as to what had occurred that day would have been the officers' testimony. Trial counsel could have believed that by offering testimony to counter the officers' accounts of what had occurred, he was providing the jury with another way in which to view the relevant events. This is a reasonable trial strategy.

Appellate counsel contends that whatever trial counsel's strategy was, the strategy was "ridiculous" because it would have required that the jury disbelieve two police officers and a probation officer, and believe Loffredo instead. The strategy may ultimately have failed, but this does not mean that trial counsel's tactical decision was objectively unreasonable. We therefore reject Gonzalez's contention that his trial counsel rendered ineffective assistance by calling Loffredo as a defense witness.

IV.

DISPOSITION

The judgment of the trial court is affirmed.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McINTYRE, J.